

OGC 78-4684

12 July 1978

*Pro Ly*

OLC #78-2757

MEMORANDUM OF LAW

FROM :   
Assistant General Counsel

SUBJECT : Personal Liability for Conduct of  
Agency Employees

1. In the past the Office of General Counsel has had the occasion to explain the law with respect to personal liability for various types of conduct by Agency employees. Recently the Supreme Court handed down an opinion which dealt further with that subject. As this new case goes to some length to explain past opinions that this Office has cited in its past advice, a review of the new case seems in order.

2. The case of Butz v. Economou, 46 U.S.L.W. 4952, was decided by the Court on 29 June. The case was brought by a commodity futures commission merchant against various officials and employees of the Department of Agriculture. Specifically those that were named as defendants were individuals who had served as Secretary and Assistant Secretary of Agriculture and several Department of Agriculture employees including the Judicial Officer and Chief Hearing Examiner, an attorney who had prosecuted an enforcement action against the plaintiff and several auditors who had investigated the charges against the plaintiff or who were witnesses against him. Economou claimed that these federal officers and employees had instituted an investigation and administrative proceeding against him in retaliation for his criticism of that Department. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed holding that they were entitled only to the qualified immunity available to their counterparts in state government, Economou v. U.S. Department of Agriculture, 535 F. 2d 688 (2d Cir., 1976).

3. In representing the defendants before the Supreme Court, the United States made a single submission; that is, that all of the federal officials in this case were absolutely immune from any liability even if in the course of

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# ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM:

Assistant General Counsel

EXTENSION

NO.

OLC #78-2251

DATE

18 July 1978

TO: (Officer designation, room number, and building)

DATE

OFFICER'S  
INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

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1. Legislative Counsel  
7D49 HQS

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enforcing the relevant statutes they infringed the plaintiff's constitutional rights and even if the violation was known and deliberate, 46 U.S.L.W. 4954. The majority of the Court would not accept this argument.

4. The Court held that in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to qualified immunity, subject only to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business, 46 U.S.L.W. 4960.

5. The Court acknowledged that in previous decisions it has recognized that there are some officials whose special functions require a full exemption from liability. Among these are judges, including those participants in adjudication within a federal administrative agency such as hearing examiners and administrative law judges, and prosecutors, including those in administrative agencies responsible for initiation of administrative proceedings, as well as agency attorneys who represent the agency in an adversary setting. It refused however to give all federal officials absolute immunity.

6. If an official is clothed with absolute immunity and he is accused of an improper or illegal action, he need only show that his action or activity was within the scope of his authority. His state of mind is not relevant. He will not be held personally liable even if his action was undertaken with malice or if he knowingly spoke falsely. However, if only clothed with qualified immunity his actions are subject to the review and judgment of a court. His action is only prima facie privileged; that privilege being subject to loss due to proof of malice or falsity.

7. The Court goes to some length to distinguish two previous cases Barr v. Mateo, 360 U.S. 564 (1959) and Spalding v. Vilas, 161 U.S. 483 (1896). The Court states that Barr did not purport to depart from the general rule that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers. "A federal official who has acted outside his federal statutory authority would be held strictly liable for his trespassory acts." 46 U.S.L.W. 4955. The Court stated that the liability of officials who have exceeded constitutional limits was not confronted in either Barr or Spalding, 46 U.S.L.W. 4957. The Court stated that:

Barr did not purport to protect an official who has not only committed a wrong under local law, but has also violated those fundamental principles of fairness embodied in the Constitution. 46 U.S.L.W. 4957.

The Court went on to say that:

Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. But we see no substantial basis for holding... that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule. 46 U.S.L.W. 4960.

8. The results of Butz v. Economou and, in particular its impact on Agency officials cannot be predicted with a high degree of certainty. The actual case was remanded to the District Court for further proceedings in accordance with the Supreme Court guidance. The results, however, will probably be that more accusations against federal officials of unconstitutional action will go to trial on the merits. I say "probably" because the Supreme Court's opinion does not preclude some cases being disposed of on motion that as a matter of law a certain official is entitled to absolute immunity. The Court anticipates this occurring. 46 U.S.L.W. 4960. Some courts might rule in this regard from the pleadings. More than likely, however, many would not so rule. Nonetheless, some courts may find an official entitled to qualified immunity based on evidence submitted by affidavit. The Court also anticipates this possibility, 46 U.S.L.W. 4960. Some, however, will undoubtedly find issues of fact disputed and require a trial. It may very well be that the frequency this latter circumstance will increase because of this recent decision.

9. Without doubt the threat to a federal employee of being held personally liable for his official acts is a great one. Existing statutes now eliminate this personal liability for certain activities of certain classes of federal employees. For example, existing law immunizes the operators of Government motor vehicles from civil suits related to their driving and almost all Government physicians from malpractice suits. The Administration is currently supporting efforts to amend the Federal Tort Claims Act by making suits against the Government the exclusive remedy in cases in which a federal employee is accused of violating

another person's constitutional rights. S.2117, which does just that, was introduced last September and hearings began in the Senate in January. A companion bill H.R. 9219 has been introduced in the House. Hearings have also been held on this bill. Both most likely will be the subject of markup in the respective subcommittees this month. The Department of Justice estimates that there is a 50-50 chance that such legislation would become law during this session of Congress.



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